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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JEAN-LOUIS GUERET

Appeal 2009-005909
Application 10/779,725
Technology Center 3700

Decided: June 9, 2010

Before JENNIFER D. BAHR, STEFAN STAIKOVICI, and
FRED A. SILVERBERG, *Administrative Patent Judges*.

Opinion of the Board filed by SILVERBERG, *Administrative Patent Judge*

Concurring Opinion filed by BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Jean-Louis Gueret (Appellant) seeks our review under 35 U.S.C. § 134 of the final rejection of claims 1, 3, 4, 6-27, 29-32, 34-40 and 42. We have jurisdiction under 35 U.S.C. § 6(b). Appellant's counsel presented oral argument on May 12, 2010.

SUMMARY OF DECISION

We REVERSE.

THE INVENTION

Appellant's claimed invention is directed to an applicator for applying cosmetic or other care products on a portion of the face or the body (Spec. 1: para. [0002] and Spec. 5: para. [0040]).

Claims 1, 34, 37 and 42, reproduced below, are representative of the subject matter on appeal.

1. An applicator comprising:
a base portion carrying an applicator element and configured for fixing onto a receptacle; and
a handle portion rotatably mounted on the base portion to turn about a fixed axis of rotation, the handle portion having a longitudinal axis, wherein the axis of rotation and the longitudinal axis of the handle portion are never mutually perpendicular, the axis of rotation and the longitudinal axis are not parallel, and wherein the base portion and the handle portion cooperate in such a manner as to enable a user to secure the handle portion in at least two predefined application positions relative to the base portion.
34. An applicator comprising:
a base portion having an axis and carrying an applicator element, the base portion being configured for fixing onto a receptacle; and
a handle portion rotatably mounted on the base portion to turn about a fixed axis of rotation, the handle portion having a longitudinal axis;

wherein an angle between the axis of the base portion and the axis of the handle portion is always strictly inferior to 90° when the handle portion is rotated about the axis of rotation, the axis of rotation and the longitudinal axis are not parallel, and wherein the base portion and the handle portion cooperate in such a manner as to enable a user to secure the handle portion in at least two predefined application positions relative to the base portion.

37. A method of applying a substance on a portion of one of the face and the body, the method comprising:

loading an applicator element with substance, the applicator element being secured to a base portion that is turnable relative to a handle portion about an axis of rotation which is never perpendicular to the longitudinal axis of the handle portion and wherein the axis of rotation and the longitudinal axis are not parallel; and

between two different application modes, modifying a direction of the base portion relative to the handle portion.

42. An applicator comprising:

a base portion carrying an applicator element and configured for fixing onto a receptacle; and

a handle portion rotatably mounted on the base portion to turn about a fixed axis of rotation, the handle portion having a longitudinal axis;

wherein the axis of rotation and the longitudinal axis of the handle portion are not mutually perpendicular and not parallel;

wherein the applicator element is configured for applying a product on at least one of lips, eyelids, eyelashes, and eyebrows, and

wherein the base portion and the handle portion cooperate in such a manner as to enable a user to secure the handle portion in at least two predefined application positions relative to the base portion.

THE REJECTIONS

The following rejections by the Examiner are before us for review:

1. Claims 1, 3, 4, 6, 10-18, 20, 23, 25-27, 30, 34, 37-40 and 42 are rejected under 35 U.S.C. § 102(b) as being anticipated by Stange (as translated¹, DE 29614364 U1, issued Nov. 28, 1996).
2. Claims 1, 3, 4, 7-18, 20, 23, 25-27, 30-32, 34-40 and 42 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Vasas (US 6,237,609 B1, issued May 29, 2001) in view of Stange.
3. Claims 7-9, 31, 32 and 35 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Stange in view of Shay (US 397,028, issued Jan. 29, 1889).
4. Claim 19 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Stange in view of Yamada (US 5,815,875, issued Oct. 6, 1998).
5. Claim 21 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Stange.
6. Claim 22 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Stange in view of Riemann (US 4,922,575, issued May 8, 1990).

¹ We believe that the translation, which was submitted by Appellant on March 20, 2007, is uncertified. The Examiner has not contested the accuracy of the translation and has not supplied another translation. Accordingly, we rely on the translation supplied by Appellant and relied on by the Examiner.

7. Claim 24 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Stange in view of Kingsford (US 5,137,038, issued Aug. 11, 1992).
8. Claim 29 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Stange in view of Samaras (US 3,164,856, issued Jan. 12, 1965).

ISSUES

The issues before us are: (1) whether the Examiner erred in finding that Stange describes at least two predefined application positions, as called for in independent claims 1, 34, 37 and 42 (Reply Br. 5, App. Br. 14); and (2) whether the Examiner erred in concluding that the combined teachings of Vasas and Stange would have led a person having ordinary skill in the art to an applicator having two different application positions, as called for in independent claims 1, 34, 37 and 42 (Reply Br. 7, App. Br. 15).

ANALYSIS

Rejection of claims 1, 3, 4, 6, 10-18, 20, 23, 25-27, 30, 34, 37-40 and 42 under 35 U.S.C. § 102(b) as being anticipated by Stange, and claim 21 under 35 U.S.C. § 103(a) as being unpatentable over Stange
Claims 1, 34, 37 and 42

Appellant contends that Stange does not describe at least two predefined application positions, as called for in independent claims 1, 34 and 42 and two different application modes, as called for in independent claim 37 (Reply Br. 5, App. Br. 14) since Stange describes a single disclosed vertical position for applying product, such as shaving cream, by a brush, and a different angled position for allowing the brush to dry (Reply Br. 6, App. Br. 14).

The Examiner found (1) that Stange describes a base portion (upper grip section) 2 carrying an applicator element (brush bristle section) 4, and a handle portion (lower grip section) 3 rotatably mounted on the base portion 2, wherein the handle portion 3 and the base portion 2 cooperate in a manner to enable a user to secure the handle 3 in at least two predefined application positions (Ans. 3); (2) that “Appellant has not clearly defined what an ‘application position’ is,” and notes that “a user can use a device according to their own preference” (Ans. 10); and (3) that “[t]here is nothing precluding the user from using the device in any of the positions as disclosed by Stange.” (Ans. 10).

Independent claim 37 differs from independent claims 1, 34 and 42 by, *inter alia*, calling for “*two different application modes*,” as opposed to calling for “*two predefined application positions*.”

Appellant’s Specification does not assign or suggest a particular definition to the terms “position” or “mode.” Therefore, in determining the ordinary and customary meaning of the claim terms “position” or “mode” as viewed by a person of ordinary skill in the art, it is appropriate to consult a general dictionary definition of the words “position” and “mode” for guidance. *Comaper Corp. v. Antec, Inc.*, 596 F.3d 1343, 1348 (Fed. Cir. 2010).

The ordinary meaning of the word “position” includes “a certain arrangement of bodily parts” and the ordinary meaning of the word “mode” includes “a particular functioning arrangement.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1996).

Therefore, we find the words “mode” and “position” are equivalent, and will use them interchangeably, *infra*.

Appellant's Specification describes that:

an applicator in accordance with the invention may be used, for example, for applying make-up to eyelids, as shown in Figure 17, or to lips, as shown in Figures 18 and 19. As shown in Figure 18, that the angle between the axes Y and Z may be at a maximum while applying make-up to a bottom lip. As shown in Figure 19, the angle between the axes Y and Z may be at a minimum while applying make-up to a top lip.

(Spec. 11: para. [0100]) (emphasis added).

Therefore, we find that Appellant's Specification describes two pre-defined application positions/modes for applying a product to the body, wherein a first application position/mode is shown in Figure 18 and a second application position/mode is shown in Figure 19.

Stange describes two predefined positions, wherein indentations 12 in the upper grip section 2 cooperate with a ball catch 11 in the lower grip section 3 (Translation 5, ll. 1-6) to define a first position, at a minimum inclination, for applying a liquid, e.g., soap and water (fig. 1), and a second position, at maximum inclination, for drying (Translation 2, ll. 9-12 and Translation 5, ll. 9-13; and fig. 3). Stange describes that in the second position, the angle of inclination between the upper grip section 2 and the lower grip section 3 can vary between 10° and 60°, wherein the preferable angle of inclination is 45° (Translation 2, ll. 16-17).

While Stange describes two predefined positions, we agree with Appellant and find that Stange only describes one application position, the position shown in Figure 1, for applying a liquid. The position shown in Figure 3, is a position for drying, and is, therefore, not an application position.

Therefore, Stange does not anticipate independent claims 1, 34, 37 and 42.

We reverse the rejection of independent claims 1, 34, 37 and 42. Likewise, we reverse the rejection of claims 3, 4, 6, 10-18, 20, 23, 25-27, 30 and 38-40, which depend from claims 1 and 37.

Claim 21

The Examiner has not provided any reasoning to remedy the deficiency in Stange (Ans. 7). Therefore, for the same reasons as set forth in the rejection of claim 1, *supra*, we reverse the rejection of claim 21.

Rejection of claims 1, 3, 4, 7-18, 20, 23, 25-27, 30-32, 34-40 and 42 under 35 U.S.C. § 103(a) as being unpatentable over Vasas in view of Stange

Appellant contends that both Vasas and Stange describe only a single application position (App. Br. 16). Therefore, Appellant contends that the combined teachings of Vasas and Stange would not have led a person having ordinary skill in the art to an applicator having two different application positions, as called for in independent claims 1, 34 and 42, and to an applicator having two different application modes, as called for in claim 37 (Reply Br. 8, App. Br. 15).

The Examiner found that Vasas describes the claimed invention, except that Vasas does not describe a handle portion rotatably mounted on a base portion (Ans. 5). The Examiner cited Stange for the teaching of an applicator having a handle portion rotatable about a base portion (Ans. 5). The Examiner concluded that it would have been obvious to a person having ordinary skill in the art to modify Vasas by substituting in Vasas for the stationary base portion and handle portion, the handle portion rotatably mounted on the base portion as taught by Stange “to provide the user with an

advanced ergonomic handle that allows the user to use multiple angles of tilt while applying a product” (Ans. 6).

The ordinary meaning of the word “ergonomics” includes “an applied science concerned with designing and arranging things people use so that the people and things interact more efficiently and safely.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1996).

The Examiner has not cogently explained why, or provided evidence tending to show that, a person of ordinary skill in the art would have understood that a handle that rotates relative to a base would allow one-handed operation which would operate more efficiently and safely than a handle that does not rotate relative to a base.

Therefore, it is not clear to us why the substitution of the relatively rotatable handle and base of Stange for the handle and base of Vasas would provide Vasas with an advanced ergonomic handle, that is, a handle that would interact more efficiently and safely with the user.

Further, as we found *supra*, Stange only describes one position, the position shown in Figure 1, for applying a liquid, and a second position, the position shown in Figure 3, for drying. Stange does not describe two application positions, and, therefore, does not describe multiple angles of tilt for applying a product, so as to have prompted a person of ordinary skill in the art to modify the handle and base of Vasas as proposed by the Examiner for the reason advanced by the Examiner.

Thus, the Examiner has not adequately articulated a rationale as to why the combined teachings of Vasas and Stange would have led a person having ordinary skill in the art to an applicator having two different application positions, as called for in independent claims 1, 34 and 42, and

to an applicator having two different application modes, as called for in claim 37. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (holding that “rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”).

We reverse the rejection of independent claims 1, 34, 37 and 42. Likewise, we reverse the rejection of claims 3, 4, 7-18, 20, 23, 25-27, 30-32, 35, 36 and 38-40, which depend from claims 1 and 34.

Rejection of claims 7-9, 19, 22, 24, 29, 31, 32 and 35 under 35 U.S.C. § 103(a)

The Examiner has not relied on Shay, Yamada, Riemann, Kingsford or Samaras for any teaching that would remedy the deficiency in Stange (Ans. 6-8). We thus reverse the rejections of claims 7-9, 19, 22, 24, 29, 31, 32 and 35.

CONCLUSIONS

The Examiner has erred in finding that Stange describes at least two predefined application positions, as called for in independent claims 1, 34, 37 and 42.

The Examiner has erred in concluding that the combined teachings of Vasas and Stange would have led a person having ordinary skill in the art to an applicator having two different application positions, as called for in independent claims 1, 34, 37 and 42.

DECISION

The decision of the Examiner to reject claims 1, 3, 4, 6-27, 29-32, 34-40 and 42 is reversed.

REVERSED

BAHR, *Administrative Patent Judge*, Concurring-in-part,

I concur in the decision of the majority to reverse the rejection of claims 1, 3, 4, 7-18, 20, 23, 25-27, 30-32, 34-40 and 42 under 35 U.S.C. § 103(a) as being unpatentable over Vasas and Stange. I join in no other portion of the decision.

mls

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